In The

# United States Circuit Court of Appeals

For The

# Ninth Circuit

R. A. AITON,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

No. 4357

## Brief of Plaintiff In Error

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Filed this.....day of January, 1925.

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### STATEMENT OF THE CASE

R. A. AITON, the plaintiff in error, was indicted on the 12th day of May, 1922, by a Grand Jury of the United States District Court for the District of Arizona, at Phoenix, Arizona, for a violation of Section 1, Act of December 17th, 1914, as amended by Act of February 24th, 1919, commonly known

as the Harrison Narcotic Drug Act, for the alleged offense of issuing prescriptions for morphine and cocaine, not in good faith and in the course of his professional practice only. He was tried by a jury which returned a verdict of guilty as charged in the first count of the indictment and the Court imposed a sentence of two years in the United States Penitentiary at Leavenworth.

From the judgment and order of the United States District Court for the District of Arizona, overruling defendant's motion for a new trial and motion in arrest of judgment, the case is brought to this Court on a writ of error.

The indictment contains nine separate counts, similar in form, in which it is alleged that prescriptions for certain narcotic drugs were issued, written and delivered by the defendant to nine different persons on various dates, not in good faith to meet the immediate needs of such persons, nor to effect cures, but on the contrary, with the intent and purpose to dispense, distribute, barter and sell the narcotic drugs mentioned for the purpose of catering to and satisfying the cravings of those persons, and not in the course of his professional practice only.

It is alleged in the first count of the indictment in question that the plaintiff in error, while a practicing physician within the District of Arizona and duly registered with the Collector of Internal Revenue for said District, as a physician, under the pro-

visions of the Act of Congress of Dec. 17th, 1914, as amended, on the 18th day of October, 1921, and within said District of Arizona, did then and there unlawfully, wilfully, knowingly and feloniously and contrary to the Act of Congress aforesaid, issue and write and deiver to one George Warner a prescription for a quantity of morphine sulphate, to-wit: fifty-six grains of morphine sulphate, not in good faith for meeting the immediate needs of the said George Warner, not to effect a cure of the said George Warner in the course of his professional practice only, the said George Warner being then and there an habitual user of and addicted to the use of such narcotic drugs, nor to treat the said George Warner then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs for the purpose of catering to and satisfying the cravings of said George Warner for such drug; that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium, and that the said George Warner, to whom said prescription was written and delivered, in the unlawful and felonious manner as set forth above, was then and there the user of, and addicted to the use of, such narcotic drugs; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

For reasons unknown to present counsel for the plaintiff in error, no Court reporter was present at the trial of this case. Therefore, we are unable to furnish a reporter's transcript of the evidence, and other proceedings, and will have to rely upon errors appearing in the record as we find it.

The record discloses the fact that numerous errors were committed by the trial Court in the admission of incompetent and illegal evidence of a highly prejudicial nature, offered by the Government, and in the rejection of competent, legal evidence offered by the defendant, tending to show good faith in the issuance of the prescriptions in question, and the lack of any criminal intent, although no specific intent to violate the law need be shown in this class of cases.

The defendant interposed a demurrer to the indictment upon the ground that the facts stated do not constitute a public offense, but the same was overruled.

Before the trial of the case, the defendant filed a motion to suppress certain prescriptions which the Government proposed to use as evidence against him. This motion was supported by the affidavit of the defendant, based upon information and belief, to the effect that officers of the Government, to him unknown, seized a sealed package containing prescriptions written by the defendant, and that such prescriptions were the identical prescriptions

mentioned in the indictment, and that they were taken by the officers from the store of the druggist who filled the same.

This motion was denied and the prescriptions were introduced in evidence at the trial of the case, to the prejudice of the defendant and in violation of his constitutional rights.

The defendant filed a motion for a new trial upon the ground that the persistent cross-examination of the learned trial judge prejudiced the rights of the defendant; that error was committed in the admission of certain documents and other evidence; that error was committed in excluding certain material evidence offered by the defendant; that the verdict is contrary to law and not supported by the evidence; that the verdict of the jury is predicated upon perjured evidence, as shown by the affidavit of George Warner, the chief witness for the Government, and to whom the prescription mentioned in the first count of the indictment, was issued. This motion was denied.

The defendant then filed a motion in arrest of judgment upon the ground that the Act approved December 17th, 1914, as amended by the Act approved February 24th, 1919, was repealed by the Act of Congress approved November 23, 1921, to become effective January 1st, 1922, by Section 1400, Title XIV, General Provisions of the Revenue Act.

This motion was also denied, whereupon the Court imposed sentence. Thereafter, the defendant filed a petition for a writ of error.

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## ASSIGNMENT OF ERRORS

### I.

The Court erred in overruling the defendant's demurrer to the prescriptions seized by the United States narcotic agent without due process of law, in violation of Article IV of the constitution of the United States, which said prescriptions were used by the United States District Attorney before the Grand Jury.

(Ab. of Record, p. 41, pgh. I.)

### II.

The Court erred in overruling defendant's motion to suppress evidence in the form of prescriptions which were seized in an illegal manner by the United States narcotic agent and used before the Grand Jury by the United States District Attorney in violation of Article V of the Constitution of the United States, which provides that no man shall be compelled in any criminal case to be a witness against himself.

(Ab. of Record, p. p. 41-42, pgh. II.)

(Ab. of Record. p. p. 18-19-20-21.)

III.

The Court erred in admitting incompetent evidence to the prejudice of the defendant in that the trial Court allowed the prescriptions seized by the United States narcotic agent in an illegal manner to be introduced in evidence against the defendant, in that said prescriptions were seized in an illegal manner, contrary to the provisions of Article IV of the Constitution of the United States, which provides that no evidence may be used against a defendant which was unlawfully seized.

(Ab. of Rec., p. 42, pgh. III, F. 37.)

(Bill of Exceptions, See Ab. of Rec., p. 59-60.)

IV.

The Court erred in admitting incompetent evidencedence to the prejudice of defendant, in that certain prescriptions signed by the defendant were illegally seized by United States officers, which, in effect, compelled the defendant to testify against himself, contrary to the provisions of Article V of the Constitution of the United States.

(Ab. of Rec., p. 42, F. 37, pgh. IV.)

V.

The Court erred in admitting incompetent evidence to defendant's prejudice, in that certain prescriptions bearing date two months after the indict-

ment under which defendant was tried, were admitted to show the intent of the defendant in the commission of the acts set forth in the indictment.

(Ab. of Rec., pp. 42 and 43, pgh. V, F. 37.)

(See Bill of Exceptions, Ab. of Rec., p.p. 59-60.)

VI.

The Court erred in admitting incompetent evidence to the defendant's prejudice, in that certain prescriptions bearing date two months after the indictment were admitted not for the purpose of contradicting any material evidence introduced on the issues raised on the indictment.

(Ab. of Rec., p. 43, pgh. VI, F. 37.)

(See Bill of Exceptions, Ab. of Rec., p. 60, pgh. I.)

VII.

The Court erred in framing questions for the United States District Attorney to ask the defendant's witnesses after objections to questions propounded by the District Attorney had been sustained, in that said conduct on the part of the trial judge prejudiced the jury against the defendant.

(Ab. of Rec., p. 43, pgh. VII, F. 38.)

(See Bill of Exceptions, Ab. of Rec., p. 60, pgh. II.)

VIII.

The Court erred in refusing to admit material evidence offered by the defendant, in that material evidence of a so-called clinic under which defendant was issuing prescriptions at the time of the indictment, was ruled out.

(Ab. of Rec., p. 43, pgh. VIII, F. 38.)

(See Bill of Exceptions, Ab. of Rec., p. 61, pgh. III, F. 54.)

IX.

The Court erred in refusing to permit a witness for the defendant who was testifying to material facts, without objection on the part of counsel for the Government, to answer a question as to the creation of a clinic, Doctor Carson being the witness, and who was testifying as to the creation and maintenance of a certain clinic for the care and treatment of certain drug addicts who were suffering from chronic or incurable diseases, thereby creating prejudice against the defendant.

(Ab. of Rec., p.p. 43-44, pgh. IX, F. 38.)

(See Bill of Exceptions, Ab. of Rec., p. 61, pgh. 111, F. 54.)

X

The Court erred in refusing to give the following instructions: "You are instructed that a reputable

physician duly in charge of bona fide patients suffering from diseases known to be incurable, such as cancer, advanced tuberculosis and many other diseases, may in the course of his professional practice and strictly for legitimate medical purposes, dispense or prescribe narcotics for such diseases, providing the patients are personally attended by the physician, that he regulates the dosage, that he prescribe no quantity greater than that usually given by members of his profession and known to be sufficient for the purpose (39).

You are further instructed that if you find upon all the facts stated above that the defendant prescribed narcotics as stated, you must find his not guilty of a violation of the Harrison Narcotic Act."

(Ab. of Rec., p. 44, pgh. X, F. 39.)

(See Bill of Exceptions, Ab. of Rec., p.p. 63-64, F. 56.)

XI.

The Court erred in excluding evidence offered by the defendant to show that a certain clinic had been created under the supervision of the Collector of Internal Revenue for this district and that certain other officials who formed a clinic for the purpose of treating certain habitual users of morphine and who were also suffering from some chronic or incurable disease; such evidence was a material part of the defendant's case in that it had a direct bear-

ing upon the question of the intent of the defendant in filling out the prescriptions upon which the indictment in this case was founded.

(Ab. of Rec., p.p. 44-45, pgh. XI, F. 39.)

(See Bill of Exceptions, Ab. of Rec., p. 62, 63, pghs. V and VI, F. 55.)

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XII.

The Court erred in ruling upon the question of law that all evidence of what narcotic agents said or did in regard to the prescriptions at the time they were inspected after their issuance by the defendant was immaterial and not a part of the case, in that the said conversations were material for the purpose of showing the intent of the defendant in issuing said prescriptions.

Ab. of Rec., p. 45, pgh. XII, F. 39.)

(See Bill of Exceptions, Ab. of Rec., p.p. 62-63, pghs. V and VI, F. 55.)

XIII.

The Court erred in ruling out evidence to the prejudice of the defendant, in that, as a matter of law, the wrappers placed on the bundles of prescriptions inspected by the uarcotic agents, which said prescriptions and wrappers formed a part of the prescriptions filed required by the provisions

of the Harrison Narcotic Act were material evidence of the intent and good faith of the defendant in filling the said prescriptions; the indictment charging him with wilfully, knowingly and feloniously filling illegal orders for narcotics.

(Ab. of Rec., p.p. 45-46, pgh. XIII, F. 40.)

(See Bill of Exceptions, Ab. of Rec., p. 62, pgh. V, F. 55.)

XIV.

The Court erred in announcing the following ruling in the presence of the jury, to the prejudice of the defendant, to-wit: "That the law laid down by the Supreme Court of the United States in the cases of the U. S. vs. Webb and U. S. vs. Moy was the law of this case and that the law of these two cases would be applied to the facts in this case."

(Ab. of Rec., p. 46, pgh. XIV, F. 40.)

(See Bill of Exceptions, Ab. of Rec., p. 63, pgh. VII, F. 56.)

XV. L

The Court erred in overruling defendant's motion for a new trial for the reason that the evidence of George Warner, named in the count upon which the defendant was found guilty, was found by the Court to be perjured evidence.

(Ab. of Rec., p. 46, pgh. XV, F. 40.)

(See Bill of Exceptions, Ab. of Rec., p. 64, pgh. IX, F. 56.)

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## ARGUMENT
## ASSIGNMENT NO. 1

This assignment of error is based upon the error of the trial Court in overruling the defendant's demurrer to the prescriptions seized by the United States narcotic agent without due process of law, in violation of Article IV of the Constitution of the United States, which said prescriptions were used by the United States District Attorney before the Grand Jury.

(Ab. of Rec., p. 41, pgh. I, F. 36.)

Ab. of Rec., p. 18, F. 18.)

This assignment or error does not appear in the bill of exceptions of the plaintiff in error, but we have taken it for granted that it refers to the motion to suppress certain evidence. (Ab. of Rec., p. 18), which motion was supported by the affidavit of the defendant, R. A. Aiton, (Ab. of Rec., p. 19, F. 14) which we quote, herewith, as follows: "R. A. Aiton, being first duly sworn, deposes and says: That he is the defendant in cause No. C.—1462, (Phoenix), which is the United States of America vs. R. A. Aiton; that prior to and at the time of this indictment this defendant was the duly licensed and practicing physician within the State of Ari-

zona and duly registered with the Collector of Internal Revenue for the State of Arizona, as a physician under the provisions of the Act of Congress of December 17th, 1914, as amended; that ever since the findings of said indictment this defendant has been, and now is, a duly licensed physician under and by virtue of the laws of the State of Arizona, and residing in Phoenix, Arizona; that affiant is informed and verily believes and upon such information and belief, says, that the United States District Attorney or certain officers of the United States of America, to him unknown, seized the sealed package in which certain prescriptions written by this defendant, were, and affiant says that said prescriptions are the identical prescriptions mentioned in the indictment aforesaid; that said prescriptions were taken by the aforesaid officers or officer from the druggist and out of the store of the druggist who filled said prescriptions and returned and sealed said prescriptions as provided by law; that said prescriptions were seized and are held by and at the instance of the United States of America and to the prejudice of this defendant because said prescriptions are of great value to this defendant and if introduced in evidence in the trial of the cause now pending will seriously prejudice this defendant and will in fact compel the defendant to give evidence against himself; that affiant is informed and believes that the Government of the United States in the prosecution of this case intends to use or attempt to use

said written prescriptions seized and held, as aforesaid; that the seizure and detention of said prescriptions by the United States Government and its officers was and is unlawful and in violation of the constitutional rights of this defendant and prejudicial to his interests.

(Signed) R. A. AITON.

Subscribed and sworn to before me this 30th day of October, 1923.

WELDON J. BAILEY,
Notary Public.

(Notarial Seal)

My commission expires Sept. 1, 1924."

So far as the record discloses, there is no denial by any witness for the Government of the facts stated in the affidavit of the defendant above referred to, as to the seizure of certain prescriptions written by him. Such papers could not be legally seized without a warrant, and not then, except upon probable cause supported by oath or affirmation.

Article IV of the Constitution of the United States provides that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The plaintiff in error feels that the seizure of the prescriptions in the manner set forth in his affidavit was without due process of law and in violation of his constitutional rights.

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## ASSIGNMENT NO. II.

This assignment of error is based upon the error of the trial Court in overruling defendant's motion to suppress evidence in the form of prescriptions which were seized in an illegal manner by the United States narcotic agent and used before the Grand Jury by the United States Attorney in violation of Article V of the Constitution of the United States, which provides that no person shall be compelled in any criminal case to be a witness against himself.

(Ab. of Rec., p.p. 41-42, pgh. II.)

(Ab. of Rec., p.p. 18, 19, 20, 21.)

Article V of the Constitution of the United States provides, among other things, that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The plaintiff in error respectfully contends that his motion to suppress these prescriptions as evidence should have been granted, and that the order of Court denying the motion violated his constitu-

tional rights.

(See Ab. of Rec., p.p. 21-22.)

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## ASSIGNMENT NO. III.

This assignment is based upon the error of the trial Court in admitting in evidence the prescriptions seized by the United States narcotic agent in an illegal manner, as hereinbefore set forth in Assignments I and II, whereby the constitutional rights of the defendant were violated.

(Ab. of Rec., p. 42, pgh. III, F. 37.)

(Bill of Exceptions, See Ab. of Rec., p. 59-60.)

The arguments advanced in support of Assignments I and II are equally applicable to this Assignment and we respectfully request that same be considered in connection with this assignment without the necessity of repetition.

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## ASSIGNMENT NO. IV.

This assignment is based upon the error of the Court in admitting incompetent evidence in the nature of prescriptions, against the defendant, to the prejudice of his substantial rights, and in violation of his constitutional rights. These prescriptions are the identical prescriptions referred to in the affidavit of the plaintiff in error, in Assignment

No. I. The use of these prescriptions after their illegal and unwarranted seizure as hereinbefore set forth, and the introduction of them in evidence against the defendant, had the effect of compelling him to testify against himself, and was in violation of the provisions of Article V of the Constitution of the United States.

The arguments in support of the previous assignments applies to this assignment, and we respectfully request that same be considered without the necessity of repetition.

In connection with Assignments I, II, III and IV, we direct the attention of the Court to the comparatively recent case of Silverthorne Lumber Company vs. U. S., 251 U. S. 385 (64 L. Ed. 319), involving the question of the right of search and seizure, wherein it was held: "That the rights of a corporation are to be protected against unlawful search and seizures even if the same result might have been achieved in a lawful way—that is, by an order for the production of the books."

So, in the case at bar, while perhaps the prescriptions in question might have been legally seized had proper process been issued for that purpose, yet, to seize them in the manner they were seized, and the use of them in evidence against the defendant was illegal and in violation of his constitutional rights, although they would have been properly admissible in evidence if they came into the possession of the

United States authorities in a legal manner.

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## ASSIGNMENT NO. V.

This assignment is based upon the error of the Court in admitting incompetent, immaterial, irrelevant and illegal evidence against the defendant, in the nature of prescriptions bearing date two months after the indictment under which the defendant was tried; the same being admitted to show the intent of defendant in the commission of the acts set forth in the indictment.

(Ab. of Rec., p.p. 42-43, pgh. V, F. 37.)
(See Bill of Exceptions, Ab. of Rec., p.p. 59-60.)

The admission of this evidence was highly prejudicial to the defendant, and that it conduced in a very large measure to his conviction there can it seems to us, be little doubt.

It was incompetent, immaterial and irrevelant for any purpose whatsoever, particularly in view of the fact that intent is not an essential ingredient in this class of offenses.

If the plaintiff in error violated the provisions of the Act in question by the illegal issuance of prescriptions, or otherwise, he was guilty regardless of the intent, or intention, with which those acts were committed

Furthermore, whether or not he issued prescriptions for centain narcotic drugs either before or after the issuance of the prescriptions as charged in the indictment, was wholly immaterial. If they tended to prove anything at all it was the commission of other offenses; to show that the plaintiff in error was making a wholesale business of the issuance of prescriptions for narcotic drugs—which the evidence in support of the allegations of the indictment did not show—and it may reasonably be inferred that the defendant was prejudiced in the eyes of the jury, and that their verdict of guilty on the first count was largely influenced thereby.

O'Connell vs. U. S. 64 L. Ed. 827.

Abrams vs. U. S. 250 U. S.. 616 (63 L. Ed. 1173).

U. S. vs. Doremus, 63 L. Ed. 493.

U. S. vs. Comyns, 248 U. S. 349 (63 L. Ed. 287).

## ASSIGNMENT NO. VI.

This assignment is based upon the error of the Court in admitting incompetent, immaterial, irrevelant and illegal evidence against the defendant, in the nature of prescriptions dated two months after the indictment under which defendant was tried, for the purpose of contradicting evidence introduced on the issues raised on the indictment.

(Ab. of Rec. p. 43, pgh. VI, F. 37.)

(See Bill of Exceptions, Ab. of Rec. p. 60, pgh. I).

The record in this case not being preserved as it would have been had there been a reporter's transcript, we are unable to state even the substance of this evidence, and, therefore, we are not in a position to decide definitely what weight it might have had with the jury, or to what extent it may have influenced their verdict. But it is not, and cannot be, denied that prescriptions issued from one to two months subsequent to the date of the arrest of the defendant on the charges contained in the indictment, were introduced by the Government upon the theory that they would rebut the defendant's testimony to the effect that he refrained from writing any more prescriptions when he was informed that he had been violating the law.

Whether or not he issued such prescriptions was wholly immaterial and irrevelant, and had absolutely no bearing on this case, nor on the question of his guilt, or innocence, of the charges in the indictment. But, the Government introduces it nevertheless, over the objections of defendant's counsel, in their apparent zeal to secure a conviction at all haards. Again, the question of intent, and whether or not willful violations of the Harrison Narcotic Drug Act were being committed by the

plaintiff in error, comes to light, when it could not possibly have any bearing on the defendant's case, or serve any othe rpurpose than to show a continuation of certain acts—the issuance of prescriptions for narcotic drugs—claimed by the government agents to be unlawful, and to show, thereby, that the plaintiff in error was engaged in the wholesale business of issuing such prescriptions and that he did not cease his operations in that line even after he had been warned by them, as had already been pointed out in previous assignments.

That it had the precise effect the United States Attorney calculated it should have, and intended it should have, there can be but little doubt, for it apparently had the effect of bolstering up an otherwise extremely weak case, and led to the conviction of the plaintiff in error on the first count of the indictment.

When prosecutions were first instituted under the provisions of the Harrison Narcotic Drug Act, the question of constitutionality of the act was raised in different Federal Courts, and demurrers to indictment were sustained upon the ground of the unconstitutionality of the act, until the decision of the United States Supreme Court in the Doremus case, wherein the constitutionality of the act was upheld.

U. S. vs. Doremus, 65 L. Ed. 493.

The question of the necessary everments in

an indictment from a violation of this Act; what is necessary by way of evidence to support the material allegations of the indictment, and what is competent, legal evidence against the accused, as well as the procedure in general in this class of cases, has been definitely settled in different cases, and the rules clearly stated by the Federal Courts from the Circuit Court of Appeal up to the United States Supreme Court.

U. S. vs. Doremus, 63 L. Ed. 493.

U. S. vs. Friedman, 224 Fed. 276.

O'Connell vs. U. S., 64 L. Ed. 827.

Abrams vs. U. S., 250 U. S. 616.

U. S. vs. Comyns, 248 U. S. 349 (63 L. Ed. 287).

Web vs. U. S., 249 U. S. 86 (63 L. Ed. 497).

U. S. vs. Behrman, 66 L. Ed. 619.

U. S. vs. Jin Fuey Moy, 241 U. S. 394 (60 L. Ed. 1016).

## ASSIGNMENT NO. VII.

This assignment is base dupon the error of the learned trial judge, presiding at the trial of this case, in framing questions for the United States District Attorney to propound to witnesses for the defendant, after objections to the original ques-

tions had been sustained by the Court.

(Ab. of Rec. p. 43, pgh. VII, F. 38).

(See Bill of Exceptions, Ab. of Rec. p. 60, pgh. II).

Due to the fact that there is no reporter's transcript available, we are in utter darkness as to the nature of the questions propounded by the United States Attorney, objections to which were sustained by the Court, as shown by the Bill of Exceptions, nor is there anything in the record which will throw any light upon the subject of the questions propounded by the learned trial judge, and which were evidently answered over the objections of counsel for plaintiff in error. Therefore, with nothing more in support of our position than the assignment of error and the Bill of Exceptions upon this point, we are averse to making the positive statement that the substantial rights of the defendant were prejudiced by such questions and the answers thereto. But we do contend that the record itself shows that the substantial rights of the plaintiff in error were prejudiced in other respects, resulting in his illegal conviction, as pointed out in previous assignments of error and as will be shown in future assignments.

## ASSIGNMENT NO. VIII.

This assignment is based upon the error of the trial Court in refusing to admit material evidence

offered by the defendant, of the establishment of a so-called clinic, under which he issued the prescriptions in question.

(Ab. of Rec. p. 43, pgh. VIII, F. 38).

See Bill of Exceptions, Ab. of Rec. p. 61, pgh. III, F. 54).

The record discloses that the plaintiff in error offered to prove by Dr. Carson and other witnesses that, after having held a conference to consider the best method of regulating and controlling the use of narcotic drugs in the City of Phoenix, they concluded that the known addicts should be referred to one doctor and kept under his care and treatment. This evidence was offered for the purpose of showing the good faith of Doctor Aiton, the plaintiff in error, in the issuance of the prescriptions to George Warner, and the other persons named in the indictment, and his lack of criminal intent, or any intention to violate any law whatsoever.

The plaintiff in error further offered to show that F. P. Barnes, a local narcotic agent during the period within which the prescriptions were issued, directed many drug addicts to plaintiff in error and requested him to treat such persons and to prescribe narcotics for them, and that, pursuant to such requests, he did write a number of prescriptions for narcotic drugs, and that those were the

prescriptions offered in evidence by the Government.

It is true that it is not incumbent upon the Government to offer evidence tending to show any specfiic intent, or intention, to violate the law in cases arising under the Harrison Narcotic Drug Act, in order to warrant the jury in returning a verdict of guilty, but it should be borne in mind that, in the case at bar, the very theory upon which the Government officers were proceeding was that the defendant issued the prescriptions in question for larger amounts of the inhibited narcotic drugs than the particular patient's case warranted; that the plaintiff in error "unlawfully, wilfully, knowingly and feloniously" issued such prescriptions "with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs for the purpose of catering to and satisfying the cravings of George Warner for such drug", and, furthermore, that he continued such illegal operations after having been warned by certain Government officials.

That the Government prosecutor offered testimony in support of those allegations of the indictment (which he deemed material averments) there can be no question.

We will grant that certain of those averments were not necessary in order that the indictment should contain a statement of facts sufficient to constitute a public offense—that they were surplus-

age. However, having so framed the indictment, and having offered testimony in support of such alllegations, it was erroneous for the learned trial judge to exclude evidence offered by the defendant in explanation of his reasons for the issuance of those prescriptions, to show his good faith and absence of criminal intent, and to rebut the evidence introduced by the Government upon those points.

The effect of the testimony offered by the Government, and which the plaintiff in error was denied the right to rebut, was to prove beyond a reasonable doubt that the defendant was issuing prescriptions for narcotic drugs by the wholesale; that he did so wilfully, knowing that he was violating the provisions of the Harrison Narcotic Act; that such acts on the part of the defendant were flagrant and that he did not desist, although repeatedly warned by certain Government officials to do so. What instructions the Court gave, if any, upon these points, we cannot say, but, instructions or no instructions, we do know from our common knowledge and understanding of matters of this kind that evidence of such acts by the defendant, unexplained by him, would tend to lead the jury to believe that he wilfully and knowingly violated the law; that he was, perhaps, a man of criminal tendencies instead of a peaceful, law-abiding citizen, and that, therefore, they should return a verdict of guilty against him. This class of evidence had the precise effect that the United States Attorney evidently calculated it should have—that Dr. Aiton

had flagrantly violated the law, and without such highly prejudicial testimony, a conviction could scarcely have been expected; on the contrary, it may very reasonably be inferred that in the absence of such testimony the plaintiff in error would have been acquitted.

The United States Attorney may object to this line of reasoning and to the conclusions which we have reached from what we understand to be the facts in this case.

However, it is undisputed, and indisputable, that the plaintiff in error was convicted on the first count in the indictment—the George Warner count. It is significant that while one count (the eighth) in the indictment alleges the issuance of a prescription for a much larger amount than in the George Warner case, yet, the defendant was acquitted on that count. Therefore, it cannot be logically reasoned that the defendant was convicted because the jury believed he issued the George Warner prescription for an unusual or unreasonable amount of the inhibited narcotic drug, simply to cater to, and satisfy the cravings of, Warner; consequently, we must seek for some other reason for his conviction, and we are irresistibly drawn to the conclusion that Dr. Aiton was convicted on "general principles", if we may be pardoned for the use of that term, by the use of which is meant that, while a particular defendant has not been shown to be guilty of any real violation of any law, yet, from the evidence

submitted—which has no real bearing upon the question of the guilt or innocence of that defendant of the charge in the indictment—and which should not have been permitted to be introduced, at least without giving the defendant an opportunity to rebut it, the jury reaches the conclusion that the defendant should be convicted "on general principles".

We contend that for the error of the learned trial judge in excluding this evidence, this case should be reversed.

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## ASSIGNMENT NO. IX.

This assignment is based upon the error of the Court in refusing to permit a witness for the plaintiff in error to testify to certain material facts, to-wit: The establishment of a so-called clinic, created for the purpose of passing upon the cases of certain drug addicts who were suffering from chronic or incurable diseases.

(Ab. of Rec., p.p. 43-44, pgh. IX, F. 38.)

(See Bill of Exceptions, Ab. of Rec., p. 61, pgh. III, F. 54.)

While Assignments VIII and IX were treated as separate assignments in the petition for a writ of error, they might very properly have been grouped as was done in the bill of exceptions.

We have quite fully covered this assignment in the argument upon Assignment VIII, which we respectfully request the Court to consider without the necessity for repetition. We desire to add, however, that, as shown in paragraph three of the bill of exceptions, and paragraph four, as well, this evidence was offered for the purpose of showing the good faith of Dr. Aiton in issuing the prescriptions in question, and, while perhaps not material or relevant in the first instance, was unquestionably material and relevant after the introduction of certain evidence by the Government tending to show bad faith, guilty knowledge and a criminal intent, or intention.

Without such illegal evidence on behalf of the Government, it is extremely doubtful if the jury would have returned a verdict of guilty, even on the first count of the indictment. To exclude the evidence offered by the defendant, constitutes reversible error.

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## ASSIGNMENT NO. X.

This assignment is based upon the error of the Court in refusing to give the following instruction requested by the plaintiff in error:

"You are instructed that a reputable physician duly in charge of bona fide patients suffering from diseases known to be incurable, such as cancer, ad-

vanced tuberculosis and many other diseases, may in the course of his professional practice and strictly for legitimate medical purposes, dispense or prescribe narcotics for such diseases, providing the patients are personally attended by the physician, that he regulates the dosage and that he prescribe no quantity greater than that usually given by members of his profession and known to be sufficient for the purpose. You are further instructed that if you find upon all the facts as stated, you must find him not guilty of a violation of the Harrison Narcotic Act.

(Ab. of Rec., p. 44, pgh. X, F. 39.)
See Bill of Exceptions, Ab. of Rec., p.p. 63-64, F. 56.)

It has been held that a physician who issues a prescription for an unusually large amount of narcotic drugs and which prescription shows on its face is unreasonable and unusual, may be found guilty of an offense under the law (Harrison Narcotic Act) unless the prescription indicates the necessity therefor.

U. S. vs. Curtis, 229 Fed. 288.

Upon the authority of the Curtis case just cited, as well as the other Federal cases hereinbefore cited, this was a perfectly proper instruction, and, in view of the allegations of the indictment, the testimony offered by the Government, and allowed to

be introduced by the Court in support thereof, and the case made out by the Government in general, it should have been given.

The failure of the Court to give this instruction, in view of all the circumstances, constitutes reversible error.

Had the defendant been permitted to do so, he might have shown by credible witnesses the usual amount of a certain narcotic drug that should be administered, and what would be a reasonable quantity for a prescription to contain in cases similar to George Warner, in order that the jury might determine whether a prescription for an unusual, or unreasonable, amount had been issued in the Warner case, but the plaintiff in error was prevented by the rulings of the trial Court from so doing.

Whether or not the prescriptions showed the necessity for the administration of the narcotic drug, the testimony of the witnesses which was ruled out would have shown the issuance of such prescriptions in the course of the professional practice of the plaintiff in error, and the issuance of them, in good faith, to meet the urgent needs of his patients, and the necessity for their issuance. Had this instruction been given, it is not unreasonable to assume that the defendant would have been acquitted.

And, in passing, we respectfully direct the atten-

tion of the Court to the fact that in all of the cases hereinbefore referred to wherein convictions of violations of the Harrison Narcotic Drug Act have been upheld by the courts of last resort (notably the Webb case and the Jin Fuey Moy case), the record discloses that the defendants were engaged in the wholesale business of issuing prescriptions for the inhibited narcotic drugs, and that such prescriptions called for amounts running into the hundreds of grains. And, in some of the leading cases there was not only shown to be a conspiracy between a certain dotcor and a certain druggist to violate the narcotic act, but an actual consummation of such conspiracy by means of orders, prescriptions and sales of narcotic drugs. We contend, therefore, that the case at bar should be distinguished from these other cases, not only by reason of the fact that the indictment is couched in different language, and consequently charges a different offense (if any offense is charged at all), but because the amounts called for in the prescriptions were unusually large, and the evidence unquestionably showed that the indicted persons were doing a wholesale business in the handling of narcotic drugs, and were not engaged in the legitimate profession of the practice of medicine, and the issuance of prescriptions in the pursuance of such practice.

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## ASSIGNMENT NO. XI.

This assignment is based upon the error of the

Court in excluding evidence offered by the defendant to show that a clinic had been created under the supervision of the Collector of Internal Revenue for the District of Arizona, and that certain officials formed such clinic for the purpose of treating habitual users of morphine, and who were suffering from some chronic or incurable disease.

In view of the indictment charging a felonious intent and purpose to dispense, distribute, barter and sell certain narcotic drugs, and the evidence introduced by the Government in support of such allegations, the evidence offered by the defendant was unquestionably relevant and material and should have been admitted.

(Ab. of Rec., p.p. 44-45, pgh. XI, F. 39.)
(See Bill of Exceptions, Ab. of Rec., p.p. 62-63, pghs. V and VI, F. 55.)

Again, the case of the plaintiff in error must be differentiated from the adjudicated narcotic cases hereinbefore referred to. In those cases the record does not disclose that the doctor under indictment took up with any narcotic officer the matter of the issuance of prescriptions for narcotic drugs, nor did any narcotic officer put his stamp of approval or his "O. K." on such prescriptions. But, in the case at bar, Doctor Aiton offered to show that he followed just that procedure, and that the issuance of the prescriptions in question in the manner they were issued; to the persons to whom they were

issued and the amounts for which they were issued, had the endorsement of the Government narcotic agent. That evidence, if allowed to go to the jury, coupled with the instruction referred to in the previous assignment, or any other instruction upon that point, would have entirely changed the aspect of this case in the eyes of the jury and would quite likely have resulted in an acquittal of the defendant in error instead of his conviction.

This error alone should, it seems to us, be sufficient to warrant a reversal of this case.

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## ASSIGNMENT NO. XII.

This assignment is based upon the error of the Court in ruling, as a matter of law, that all evidenc as to what narcotic agents said, or what they did, at the time prescriptions were inspected after their issuance, was immaterial, and that such evidence was inadmissible to show the intent of the defendant in issuing them.

(Ab. of Rec., p. 45, pgh. XII, F. 39.)

(See Bill of Exceptions, Ab. of Rec., p.p. 62-63, pghs. V and VI, F. 55.)

In view of the allegations as to the unlawful and willful issuance of the prescriptions by the defendant, with the intent and purpose on his part to dispense, distribute, barter and sell the narcotic drugs

mentioned, not in the course of his professional practice only, but on the contrary, to cater to and satisfy the cravings of the persons named, which allegations are the basis of the indictment in this case, and the evidence introduced by the Government in support thereof, the evidence offered by the plaintiff in error was competent and material, and for the Court to exclude it was highly prejudicial to his ease. This question has been quite thoroughly gone into in assignment eleven, and inasmuch as the argument advanced in support of that assignment is equally applicable to this assignment, we respectfully request that it be so considered.

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## ASSIGNMENT NO. XIII.

This assignment is based upon the error of the Court in ruling, as a matter of law, that the wrappers placed on the bundles of prescriptions inspected by the narcotic agents, and which were offered in connection with the prescriptions for the purpose of showing the good faith of the defendant, were inadmissible.

(Ab. of Rec., p.p. 45-46, pgh. XIII, F. 40.)

(See Bill of Exceptions, Ab. of Rec., p. 62, pgh. oV, F. 55.)

This assignment is covered by the argument upon Assignments XI and XII, and we deem a repetition unnecessary.

## ASSIGNMENT NO. XIV.

This assignment is based upon the error of the Court in announcing in the presence of the jury, during the trial of this case, that the rule laid down by the Supreme Court of the United States in the cases of U. S. vs. Webb, and U. S. vs. Moy was the law of this case and that the law as laid down in those two cases would be applied to the facts in this case.

(Ab. of Rec., p. 46, pgh. XIV, F. 40.)

See Bill of Exceptions, Ab. of Rec., p. 63, pgh. VIII, F. 56.)

As shown by the bill of exceptions, this statement was made by the Court before all the facts were before the Court and at a time when it was impossible for the trial Court to know what the facts in this case were, which ruling prejudiced the jury against the defendant.

In the absence of a complete reporter's transcript of the record and proceedings, it is utterly impossible for counsel to state, with any degree of certaintl, just what effect, if any, this statement had on the minds of the trial jurors, or to what extent, if at all, they were influenced by it to the prejudice of the defendant.

While the rule, or rules, of law laid down by the United States Supreme Court in the Webb case, the

Jin Fuey Moy case, or any other case wherein the facts were similar to those in the present case, would unquestionably be applicable to this case and binding upon the trial Court, yet, even a casual examination and analysis of the case of Webb vs. U. S. (249 U. S. 86, 63 L. Ed. 497) and the case of Jin Fuey Moy vs. U. S. (241 U. S. 394, 60 L. Ed. 1016) will disclose the fact that there is a vast distinction between those cases and the case at bar in many, if not all, of the essential elements.

The Webb case was before the United States Supreme Court on a certificate from the United States Court of Appeals for the Sixth Circuit, presenting the question whether retail sales of morphine by druggists to persons without a physician's prescription or order blank are forbidden by the Harrison Narcotic Drug Act; and the question whether, if the act is construed to prohibit such sales, it is unconstitutional, and the question whether certain orders of physicians amounted to prescriptions.

The first question was answered in the affirmative and the second question, as well as the third, were answered in the negative. We quote from the opinion of Mr. Justice Day, as follows: "This case involves the provisions of the Harrison Narcotic Drug Act, considered in No. 367, just decided (249 U. S. 86, ante, 493, 39 Sup. Ct. Rep. 214). "The case comes here upon a certificate from the Circuit Court of Appeals for the Sixth Circuit."

"From the certificate it appears that Webb and Goldbaum were convicted and sentenced in the District Court of the United States for the western district of Tennessee on a charge of conspiracy (Penal Code, Sec. 37 (36 Stat. at L. 1096, chap. 321, Comp. Stat. 1916, Sec. 10,171) to violate the Harrison Narcotic Law, December 17, 1914, 38 Stat. at L. 785, chap. 1, Comp. Stat. 1916, Sec. 6287 g.

"While the certificate states that the indictment is inartificial, it is certified to be sufficient to support a prosecution upon the theory that Webb and Goldbaum intended to have the latter violate the law by using the order blanks (Sec. 1 of the act) for a prohibited purpose.

"The certificate states: 'If Sec. 2, rightly construed, forbids sales to a nonregisterable user, and if such prohibition is constitutional, we next meet the question whether such orders as Webb gave to applicants are "prescriptions" within the meaning of exception (b) in Section 2.'

"We conclude that the case cannot be disposed of without determining the construction and perhaps the constitutionality of the law in certain particulars, and for the purpose of certification, we state the facts as follows—assuming, as for this purpose we must do, that whatever the evidence tended to show, in aid of the prosecution, must be taken as a fact: 'Webb was a practicing physician and Gold-

baum a retail druggist, in Memphis. It was Webb's regular custom and practice to prescribe morphine for habitual users, upon their application to him therefor. He furnished these "prescriptions" not after consideration of the applicant's individual case, and in such quantities and with such direction as, in his judgment, would tend to cure the habit, or as might be necessary or helpful in an attempt to break the habit, but with such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions.

Webb was duly registered and paid the special tax as required by Section 1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law. Goldbaum had been provided with the blank forms contemplated by section 2 of the act for use in ordering morphine, and, by the use of such blank order forms, had obtained from the wholesalers, in Memphis, a stock of morphine. It had been agreed and understood between Webb and Goldbaum that Goldbaum should, by using such order forms, procure a stock of morphine which he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions.

It was the intent of Webb and Goldbaum that morphine should thus be furnished to the habitual users thereof by Goldbaum, and without any physi-

cian's prescription issued in the course of a good faith attempt to cure the morphine habit. In order that these facts may have their true color, it should also be stated that within a period of eleven months Goldbaum purchased from wholesalers in Memphis thirty times as much morphine as was bought by the average retail druggist doing a larger general business, and that he sold narcotic drugs in 6,500 instances; that Webb regularly charged 50 cents for each so-called prescription, and within this period had furnished, and Goldbaum had filled, over four thousand such prescriptions; and that one Rabens, a user of the drug, came from another state and applied to Webb for morphine, and was given at one time ten so-called prescriptions for one drachm each, which prescriptions were filled at one time by Goldbaum upon Raben's presentation, although each was made out in a separate and fictitious name.'

"Upon these facts the Circuit Court of Appeals propounds to this court three questions:

1. "Does the first sentence of section 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, and who have no order blank therefor, and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued?"

2. "If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?"

3. "If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under the exception (b) of section 2?"

"If question one is answered in the negative, or question two in the affirmative, no answer to question three will be necessary; and if question three is answered in the affirmative, questions one and two become immaterial."

BY THE COURT: "What we have said of the construction and purpose of the act in No. 367 plainly requires that question one should be answered in the affirmative. Question two should be answered in the negative for the reasons stated in the opinion in No. 367. As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative."

The manifest injustice done to Doctor Aiton, the

plaintiff in error, by the application to his case of the rule laid down in the Webb case is apparent at a glance. The indictment in that case differs from the one in the present case in that it charged a conspiracy between a doctor (Webb) and a druggist (Goldbaum) to violate the Harrison Narcotic Law, while in the case at bar the indictment charges, in substance, that the defendant "did then and there unlawfully, wilfully, knowingly and feloniously and contrary to the act of Congress aforesaid, issue, and write and deliever a prescription to one George Warner for a quantity of morphine sulphate, to-wit: fifty-six grains of morphine sulphate, not in good faith for meeting the needs of the said George Warner, not to effect a cure of the said George Warner in the course of his professional practice only, the said George Warner being then and there an habitual user of and addicted to the use of such narcotic drugs, nor to treat the said George Warner then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs for the purpose of catering to and satisfying the cravings of said George Warner for such drug."

There is not only a vast distinction between the indictment in the Webb case and that in the present case, but the facts are widely different. There is no evidence in the case at bar of any agreement, or understanding, between the plaintiff in error and

any druggist, that they should do certain acts which, in themselves, constituted a violation of law.

There is no evidence in the present case of the issuance of a large number of prescriptions—running into the thousands within the period of a few months—for large amounts—an ounce, or more, at a time—or for any other unusual or unreasonable amount of the inhibited drugs. On the contrary, the indictment in the case at bar shows that but one prescription was issued to each person, and the amount called for could scarcely be called unusual, or unreasonable, especially in the George Warner case—the only count in the indictment upon which the plaintiff in error was convicted.

In the Webb case the prescriptions were made out in the names of fictitious persons in several instances, while in the present case the true name was given in each instance.

It is undisputed, and indisputable, that Doctor Aiton did everything openly, and above-board. He issued the prescriptions in the course of his professional practice as a physician, evidently in amounts sufficient only to meet the needs of bona fide patients, and instead of evincing any desire to defy, or evade, the Harrison Narcotic Drug Act, by means of a conspiracy, or otherwise, he acted in good faith, issuing the prescriptions after the submission of the cases to the clinic, and that such practice had the approval of the United States Narcotic officers.

All these things the plaintiff in error offered to prove, but he was prevented from doing so by the Court, upon the objections of the Government, notwithstanding the fact that the United States officials in prosecuting this case were proceeding upon the theory that the case at bar was at least analagous to the Webb and Jin Fuey Moy cases, and we believe we have the right to assume they introduced evidence tending, at least, to support that theory, and then, when the defendant offers evidence to rebut the illegal evidence thus introducd, he is denied that right.

The Jin Fuey Moy case (254 U. S. 189, 65 L. Ed. 214) was before the United States Supreme Court upon a writ of error. The plaintiff in error (Jin Fuey Moy) was indicted and convicted for a violation of Section 2 of the Act of Congress approved December 17, 1914, commonly known as the Harrison Antinarcotic Act.

He filed a motion in arrest of judgment which was overruled by the trial Court and the case was taken directly to the Supreme Court upon a writ of error, upon the ground of the unconstitutionality of the act.

It appears that the plaintiff in error was indicted by an indictment containing twenty counts, differing only in matters of detail. He was convicted upon eight counts and acquitted upon the others. The indictment charged, in substance, "that on the

.....day of ....., in the County of Allegheny, in the Western District of Pennsylvania, the defendant was a practicing physician and did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away, certain derivatives and salts of opium, to-wit, a specified quantity of morphine sulphate, to a person named, not in the pursuance of a written order from such person on a form issued in blank for that purpose by the Commissioner of Internal Revenue, under the provisions of Section 2 of the act, in that said Jin Fuey Moy, at the time and place, aforesaid, did issue and dispense to the person named a certain prescription; that said person was not a patient of the said Jin Fuey Moy, and that the said morphine sulphate was dispensed and distributed by said Jin Fuey Moy not in the course of his professional practice only, contrary to the Act of Congress * * * ."

The case at bar should be distinguished from the Jin Fuey Moy case in several important particulars.

In the first place, Jin Fuey Moy was indicted for the offense of selling, bartering, exchanging and giving away certain derivatives and salts of opium —morphine sulphate—in that he did issue and dispense a prescription, etc. In other words, Jin Fuey Moy was charged with a direct sale, whereas, in the present case, the plaintiff in error is charged with the issuance and delivery of a prescription (in the George Warner count) for fifty-six grains of

morphine sulphate, * * * with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs * * *, only; which allegations are not sufficient to charge a public offense, under the provisions of the Federal Penal Code pertaining to indictments, or any of the leading Federal cases which have reached the appellate courts, in general, or of any of the adjudicated cases arising under the Harrison Narcotic Act, in particular. But, this phase of the case will be more fully discussed in a later assignment, touching upon the question of the sufficiency of the indictment.

The point we desire to bring out at this time is this: The trial Court, in the case at bar, should have differentiated between the Jin Fuey Moy case and this case, and not used it as a precedent for the guidance of the United States Attorney, or for the jury to follow, because if there was any analogy whatsoever as to all the essential elements, that it had no bearing on the present case, and reference to it in the presence of the jury, and the use of it by the prosecuting attorney as a precedent, could scarcely serve any other purpose than to confuse the jury as to the true issues involved in the case they were trying, to the prejudice of the defendant.

It will be observed in the Jin Fuey Moy case that it was held that: 'The exceptions from the provisions of the Harrison Antinarcotic Act of December 17, 1914, Section 2, against the sales of opium derivatives to persons not having a written order in

official form which that section makes in favor of registered physicians dispensing or distributing any such drug to patients in the course of their professional practice only, and of the sale, dispensing or distributing of the drugs by a dealer upon prescriptions issued by a registered physician, must be deemed to confine the immunity of a registered physician in dispensing the drugs mentioned strictly within the appropriate bounds of a physician's professional practice and not to protect a sale to a dealer, or a distribution intended to cater to the appetite or satisfy the cravings of one addicted to the use of the drug."

It was also held in the case just cited that: "A physician may be found guilty under the Harrison Narcotic Act of December 17, 1914, of participating as a principal in the prohibited sale of an opium derivative belonging to any other person where he unlawfully issues a prescription therefor to the would-be purchaser, in view of the provisions of section 2 of that act, making it unlawful for any person to sell, barter, exchange or give away any such drug except in pursuance of a written order, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, with exceptions in favor of registered physicians dispensing or distributing any such drug to patients in the course of their professional practice only, and of the sale, dispensing or distributing of the drugs by a dealer upon prescriptions issued by registered physicians."

It will be observed that while the judgment of the trial Court based upon the verdict of the jury convicting Webb and Goldbaum, was affirmed by the appellate courts, nevertheless, the Chief Justice dissented and Mr. Justice McKenna, Mr. Justice Van Deventer, and Mr. Justice McReynolds concurred in the dissent.

However, the constitutionality of the Act in question was upheld, and, therefore, we are not concerned with that question in the present case. But, we do contend that outside of the question of the constitutionality of the act, the trial Court erred in using the Webb case as a precedent for rulings on questions of law in the case at bar, when the indictments, and the facts in support of them, were so widely at variance in the two cases, for the reasons already stated.

We desire to call the attention of the Court to the case of the United States vs. Doremus, 249 U. S. 86 (63 L. Ed. 493). While this case was not used as a precedent in the trial of the case at bar, we quote from it in order that a distinction may be drawn between that case and the present one. Mr. Justice Day delivered the opinion of the court, which, in part, is as follows:

"Doremus was indicted for violating Section 2 of the so-called Harrison Narcotic Act of December 17, 1914. Upon demurrer to the indictment the District Court held the section unconstitutional for

the reason that it was not a revenue measure, and was an invasion of the police power reserved to the states * * *. There are ten counts in the indictment. The first two treated by the court below as sufficient to raise the constitutional question decided. The first count in substance charges that: "Doremus, a physician, duly registered, * * * did unlawfully, fraudulently and knowingly sell and give away and distribute to one Ameris a certain quantity of heroin, to-wit, five hundred one-sixth grain tablets of heroin, a derivative of opium, the sale not being in pursuance of a written order on a form issued on the blank furnished for that purpose by the Commissioner of Internal Revenue."

"The second count charges in substance that: Doremus did unlawfully, and knowingly sell, dispense, and distribute to one Ameris five hundred one-sixth grain tablets of heroin not in the course of the regular professional practice of Doremus, and not for the treatment of any disease from which Ameris was suffering, but, as was well known by Doremus, Ameris was addicted to the use of the drug as a habit, being a person known as a "dope fiend", and that Doremus did sell, dispense, and distribute the drug heroin to Ameris for the purpose of gratifying his appetite for the drug as an habitual user thereof."

After quoting the provisions of Sections 1 and 2 of the Harrison Narcotic Act, in part, the Court says:

"It is made unlawful for any person to obtain the drugs by means of the order forms for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs, or the legitimate practice of his profession.

The Court further says: "It is apparent that the section makes sales of these drugs unlawful except to persons who have the order forms issued by the Commissioner of Internal Revenue, and the order is required to be preserved for two years in such a way as to be readily accessible to official inspection. But it is not to apply (a) to physicians, etc., dispensing and distributing the drug to patients in the course of professional practice, the physician to keep a record thereof, except in the case of personal attendance upon a patient; and (b) to the sale, dispensing, or distributing of the drugs by a dealer upon a prescription issued by a physician, etc., registered under the act."

The judgment of the District Court dismissing the case upon the demurrer to the indictment was reversed by the Supreme Court, thereby upholding the constitutionality of the Act. The Chief Justice dissented, and the dissent was concurred in by Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice McReynolds.

But, we reiterate, the question of the constitutionality of the act does not concern us in the present case.

We simply cite this (Doremus) case to show the distinction between it and the case at bar. The rule of law is very clearly defined, then, conversely, it would be lawful for a person to obtain the inhibited drugs by means of the order provided for for the purpose of a sale or distribution of the same in the conduct of a lawful business in the drugs, or the legitimate practice by a physician of his profession. It also follows that sales of these drugs are lawful to persons who have the required order forms and the order is preserved for official inspection. Nor does the inhibition against the sale, dispensing or distributing of the drugs apply to physicians * * * dispensing and distributing the drugs in the course of professional practice to patients, provided the physician keeps a record, except in the case of personal attendance upon a patient. Neither does it apply to the sale, dispensing, or distributing of the drugs by a dealer upon a prescription by a physician * * * registered under the act.

Applying the converse of the rule, as above stated, to the case at bar, the question naturally arises: In what respect did Doctor Aiton violate any of the provisions of the Harrison Act? Far from any violation of the act in question, according to the rule of law laid down in these adjudicated cases, the record in the present case shows conclusively, so it appears to us, that the plaintiff in error, at all times mentioned in the indictment, kept himself well within the spirit, as well as the letter, of the Act, according to the interpretation

of the different provisions in the cases cited, and was within his legal rights in the issuance of the prescriptions which are the foundation of the indictment upon which he was convicted.

In this connection, we desire to direct the attention of the Court to the case of the United States vs. Behrman, wherein it was held that: "Section 2 * * * does not protect a physician who has issued to one known by him to to be a drug addict, threee so-called prescriptions for 150 grains of heroin, 360 grains of morphine and 210 grains of cocaine."

U. S. vs. Behrman, 258 U. S. 289 (66 L. Ed. 619).

Thus it will be seen, that in the Berhman case, as well as all the others previously cited, the indictment not only charged, but the testimony evidently sustained the allegations of sales of different kinds of narcotic drugs, under so-called prescriptions, calling for amounts that were unusual, unreasonable, and, perhaps, not in the course of the professional practice of the physician in question to bona fide patients, but, on the contrary that he was making a wholesale business of the traffic in those drugs. These conditions and circumstances, we submit, are not present in the case of the plaintiff in error.

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## ASSIGNMENT NO. XV

This asignment is based upon the error of the

trial court in overruling defendant's motion for a new trial for the reason that the evidence of George Warner, named in the court of the indictment upon which the defendant was found guilty, was found by the Court to be perjured evidence.

(Ab. of Rec., p. 46, pgh. XV, F. 40).

(See Bill of Exceptions, Ab. of Rec. p. 64, pgh. IX, F. 56).

The plaintiff in error also filed a motion in arrest of judgment. (See Ab. of Rec., pp. 34 and 35) which was denied by the Court. (See order of the Court, Ab. of Rec. pp. 47-48). This motion should have been granted upon the authority of United States vs. Goodwin, 20 Fed. 327, for the reason that the Act approved December 17, 1914, as amended by the Act of Congress approved February 24, 1919, was repealed by Act of Congress approved November 23, 1921, to become effective January 1, 1922, by Section 1400, Title XIV, General Provisions of the Revenue Act. (42 U. S. Statutes at Large, Section 1400, pp. 320-321).

This assignment was not incorporated in the petition for a writ of error, nor in the bill of exceptions, but, inasmuch as it appears upon the face of the record, we respectfully request the Court to consider it, for the reasons hereinafter set forth, although the argument upon the asignment of the error of the court in refusing to grant the motion for a new trial, and the authorities in support

thereof, hereinafter cited, apply with equal force to this asignment.

Again referring to the motion for a new trial, which was overruled, as before stated, there is a more potent reason why this motion should have been granted, and that is the fact that the indictment in this case does not state facts sufficient to constitute a public offense. This question was first raised by demurrer, (Ab. of Rec. pp. 15 and 16), which was overruled by the Court (Ab. of Rec. pp. 17) and an exception to the ruling duly noted. The demurrer to this indictment should have been sustained, and the failure of the trial Court to do so constitutes reversible error.

The motion in arrest of judgment should have been granted, and the refusal of the Court to do so also constitutes reversible error.

We have observed, in passing, that the indictment in the present ease differs from the indictments in the cases previously cited—wherein convictions have been sustained, or where rulings adverse to the accused have been made by the Courts of last resort—in many, if not all, of the essential elements. The indictment before the Court differs from the indictments in those other cases not only in form, but in substance as well. In other words: It charges no offense whatsoever, and falls considerably short of the requirements of the Federal

Penal Code upon the question of the sufficiency of indictments.

It has been held that; "it is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law and to enable the accused to know the nature and cause of the accusation and to plead the judgment, if one be rendered, in bar of a future prosecution of the same offense. If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.

U. S. vs. Behrman, 258 U. S. 279, (66 L. Ed. 619).

It cannot be truly said that the indictment in the case at bar measures up to the standard required by the Federal Penal Code, nor does it meet the requirements of the rule of law laid down in the case just cited. In fact, no offense being charged, it follows that if judgment of conviction against the plaintiff in error is allowed to stand, he could, after having suffered the punishment imposed by the trial Court, be again brought before the bar of the same court for another trial upon the identical state of facts, under an indictment charging, in proper form, a violation of the Harrison Narcotic Drug Act, and he could not plead the judgment of former conviction in bar of such future prosecution. We do not charge the government officials with any de-

sire to commit any such act of injustice toward the plaintiff in error, on the contrary, we disclaim any such intention on their part, but, nevertheless, that is exactly what might be done.

The Jin Fuey Moy case (U. S. vs. Jin Fuey Moy, 254 U. S. 189, 65 L. Ed. 214), was referred to in a previous assignment (XIV), but on another point. We now respectfully direct the attention of the Court to the indictment in that case, for the purpose of a comparison between it and the indictment in this case, upon the question whether or not a public offense is charged and upon the sufficiency of the indictment in general.

In the Jin Fuey Moy case, the indictment alleged, among other things that: "the defendant was a practicing physician and did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away, certain derivatives and salts of opium, to-wit, . . . . a quantity of morphine sulphate to . . . . . not in the pursuance of a written order . . . . . in that said Jin Fuey Moy . . . . did issue and dispense . . . a certain prescription . . . . and that said morphine sulphate was dispensed and distributed by said Jin Fuey Moy . . . . contrary, etc."

In other words: Jin Fuey Moy was charged with a direct sale of morphine sulphate, and also with the issuance and dispensing of a prescription, whereas, in the case at bar no sale whatever is charged. The indictment simply charges that he

"did then and there unlawfully, wilfully, knowingly, and feloniously and contrary to the Act of Congress . . . . . issue, write and deliver a prescription . . . . with the intent and purpose to dispense, distribute, barter and sell such narcotic drug

. . . . ." Thas is, that the defendant (Aiton) did issue, write and deliver a prescription, with the intent and purpose to dispense, distribute, barter and sell the drugs, which is an entirely different thing from charging that he actually sold and dispensed them. A person might intend to do a certain thing, or to commit a violation of law, but so long as there is no execution of the intention or purpose, there can be no criminality, under a form of indictment such as the one in question. It must be borne in mind that the plaintiff in error here is not charged with a conspiracy to violate the law, as was the fact in the Webb and Goldbaum case.

In the latter case (Webb vs. U. S. 249 U. S. 86, 63 L. Ed. 497), while the record apparently does not contain a copy of the indictment, yet it does show that; "it is certified to be sufficient to support a prosecution upon the theory that Webb and Goldbaum intended to have the latter violate the law by using the order blanks, (Section 1 of the Act) for a prohibited purpose, and the record further discloses that these persons were charged with a conspiracy.

In the Doremus case, (U. S. vs. Doremus, 63 L.

Ed. 493) also, a direct sale of narcotic drugs was charged, the indictment alleging, in substance, that: Doremus, a physician, . . . . did unlawfully, fraudulently and knowingly sell, give away and distribute to one Ameris a quantity of heroin . . . . ."

The second court in the Doremus indictment charges, in substance, that: "Doremus did unlawfully, and knowingly sell, dispense, and distribute to one Ameris five hundred one-sixth grain tablets of heroin . . . . . and that Doremus did sell, dispense and distribute the drug heroin to Ameris for the purpose of gratifying his appetite for the drug . . . . ."

The allegations of the indictment in the case at bar are vague and indefinite; too much so to enable the defendant to know the precise nature of the offense with which he is sought to be charged. In the first place, it does not clearly appear upon what date the offense is alleged to have been committed, if the date of the commission of the offense is alleged. The indictment charges, in part, that: "R. A. Aiton, a practicing physician, within the District and Jurisdiction aforesaid, and fully registered with the Collector of Internal Revenue . . . . under the provisions of the Act of Congress of December 17, 1914, as amended, on the 18th day of October, A. D. 1921, and within the said District of Arizona, did then and there unlawfully, wilfully, knowingly and feloniously and contrary to the act

of Congress, . . . . . issue and write and deliver a prescription . . . . "

The indictment is headed: "Viol. Sec. 1, Act of Dec. 17, 1914, as amended, by Act of Feb. 24, 1919, issuing prescriptions for morphine and cocaine not in good faith and in the course of his professional practice only."

But, the significant thing is that, regardless of whether it was intended to charge a violation of section 1 or of section two of the act, no violation of either section is charged with sufficient clearness to show a violation of law and to put the defendant on notice of the nature of the accusation against him in order that he might properly prepare his defense. It would appear that "good faith" is an essential element (or at least the government officials so deemed it) of the indictment, yet, when he comes into Court prepared to meet that issue he is denied the right as pointed out in a previous assignment.

The question naturally arises: May a practicing physician duly registered . . . . and strictly in the course of his professional practice issue a prescription to a bona fide patient who comes to him for treatment for a chronic disorder if that patient be at the same time a drug addict

Or was it the intention of Congress to prohibit the issuance of narcotic drug prescriptions in all cases regardless of the circumstances or conditions?

It seems to us that the first question must be answered in the affirmative and the second question in the negative.

That being the case, another question arises, and that is: What is the maximum amount for which a physician may write a prescription for a bona fide patient (even though he be a drug addict) in the course of professional treatment?

To that question one expert might give one answer, and another expert another answer—one, a larger dose, another a smaller one—no two experts would agree. Consequently, it is left to the Court and jury to determine what is the standard of guilt in each separate case before them, and therein lies the harm. Furthermore, it is in violation of the constitutional rights of the accused. This precise point (under a different act of Congress) was decided in the case of the United States vs. Cohen Grocery Company, 255 U. S. 680 (65 L. Ed. 517) a case arising under the Lever Act of August 10, 1917, for alleged profiteering, wherein it was held that: "Congress in attempting to punish criminally any person who wilfully makes "any unjust or unreasonable rate or charge in handling or dealing with any necessaries" violated U. S. Constitution, 5th and 6th Amendments, which require an ascertain standard of guilt, fixed by Congress, rather than by Court and juries and secure to the accused persons the right to be informed of the nature and cause of the accusations against them".

There was no ascertained standard of guilt fixed by Congress in the Lever Act, nor is there in the Harrison Narcotic Drug Act, that we have been able to find in our investigation of the latter act for that purpose.

Before going into the question of the sufficiency of the indictment any further, we desire to again refer to assignment VIII, wherein error is predicated upon error of the trial Court in failing and refusing to give an instruction with reference to prescriptions to bona fide patients, involving the question of good faith.

It has been held in some cases arising under the prohibition act that "Inasmuch as the indictment alleged that the defendant issued the prescription upon which the first count was based, "not in good faith" it was error not to instruct the jury upon the question of good faith of the defendant."

Lambert vs. Yellowley, 291 Fed. 640.

U. S. vs. Freund, 290 Fed. 411.

The attention of the Court is respectfully directed to the language in that part of the indictment in this case alleging that the prescription was not issued in good faith for meeting the immediate needs of George Warner, not to effect a cure of the said George Warner in the course of his professional practice only . . . .

While it is not argued that this language was essential to the sufficiency of the indictment, nevertheless, since the same was alleged and read to the jury as a part of the offense with which the defendant was charged, the defendant was entitled to have the above instruction given to the jury in his behalf. Congress, through the Harrison Narcotic Act does not forbid the use of morphine sulphate as a therapeutic agent, but on the other hand recognises its extensive use, if not value, in medical practice, the faith of a large part of professional people therein, and Congress sanctions its continued use, whether or not it could have prohibited it altogether. If therapeutics were an exact science, if diseases and their courses were of determined diagnosis and invariable prognosis, if patients were constructed alike, if remedies could be measured by fixed rule, a fixed dosage could be followed.

But since in respect to all of these factors the truth is otherwise, every patient presenting to the physician a different problem for solution, the defendant in this case was entitled to have the jury instructed with respect to its findings upon the question of the good faih of the defendant in issuing the prescription upon which he was convicted in the first count of the indictment.

Inasmuch as the indictment in the present case alleged that the defendant issued the prescription upon which the first count was based, "not in good faith", it was error not to instruct the jury upon

the question of the good faith of the defendant.

Returning to the question of the sufficiency of the indictment in the case at bar (Assignment XV). It has been held that "An indictment for a violation of the provisions of the Harrison Anti-narcotic Act, December 17, 1914, against selling narcotic drugs to persons not having written orders need not charge that the defendant sold the inhibited drugs knowing them to be such, the statute not making such knowledge an essential element of the offense."

U. S. vs. Balint, 258 U. S. 250 (66 L. Ed. 604).

In the case just cited it is apparent that a sale of narcotic drugs was charged in the indictment, whereas, in the present case no sale is charged—simply the issuance of a prescription with the intent to sell * * *—a different matter entirely. So it is with all the cases previously cited, wherein convictions have been sustained; therefore, we reiterate that there is a vast distinction between those cases and the present one.

The indictment in the case at bar falls short of the requirements of the Federal Penal Code in that it does not describe the offense sought to be charged with sufficient clearness, or degree of particularity, to put the accused on notice of the nature of the accusation against him.

It has been held that: "An indictment for a

statutory offense need only charge facts sufficient to show that the accused is not within any exception in such statute."

U. S. vs. Behrman, 258 U. S. 280 (66 L. Ed. 619).

In the present case it clearly appears that the plaintiff in error comes within the exceptions mentioned in the Act, and that, therefore, he could not be legally convicted, even though he committed all of the acts with which he was charged in the indictment.

In the case of the United States vs. Reynolds, 244 Fed. 991, it was held: "That the Harrison Law (Act of December 17, 1914) requires nothing of physicians issuing prescriptions for opium save that they be registered, and the prescriptions be signed * * *. "By giving a prescription, the physician does not 'dispense' opium, in the sense of the word as used in said law. As used therein, 'dispense' relates to actual delivery of the drug by the physician to the patient, from the former's office supply, generally, although not excluding other actual delivery." As defendant is not charged with having failed to so register or to sign the prescription, he is not accused of any offense or violation of said law."

In the same (Reynolds) case we find this language by the Court: "In said law there is nothing

prescribing quantities or forbidding prescriptions for the drug in any quantity. Any attempt to find therein by construction or implication does violence to the elementary principle that, when legislatures undertake to create offenses, it must be by language clear and definite, making it obvious to ordinary intelligence that by certain conduct an offense, and the offense denounced by the statute, is committed. "Hence such construction or implication is never permitted."

We are aware that the decision in the Reynolds case is in conflict with some of the later cases, as to some of the questions raised, but, nevertheless, it is in harmony with those very cases upon the question of the construction of criminal statutes and the interpretation to be placed on them. This (Reynolds) case is also cited because it contains a judicial interpretation and definition of the term "dispense" —a term which is used in the case at bar. But, in the present indictment it is not even charged that the defendant dispensed the narcotic drug, but simply issued the prescription "with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs * * *."

In the Jin Fuey Moy case (254 U. S. 189)—(which at first sight appears to be against the contention of the plaintiff in error in the present case, as to some of the points raised)—the Court said: "Manifestly, the phrases, 'to a patient' and 'in the course of his professional practice only', are in-

tended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to include a sale to a dealer, or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A prescription issued for either of the latter purposes protects neither the physician who issues it, nor the dealer who knowingly accepts and fills it." Other cases to the same effect are:

Melanson vs. United States, 256 Fed. 783;

Thompson vs. United States, 258 Fed. 196;

Saunders vs. United States, 260 Fed. 386;

Friedman vs. United States, 260 Fed. 388;

Doremus vs. United States, 63 L. Ed. 493.

But, in all of the above cases, it is apparent that the defendants were charged in the indictments with actual sales, and of dispensing or distributing the drugs, and not with the offense of issuing, writing and delivering prescriptions "with the *intent* and purpose to dispense, distribute, barter and sell", only.

We stated in one of the opening assignments that inasmuch as the constitutionality of the Harrison Narcotic Drug Act had been upheld in the Doremus

case, we were not concerned with that question in this case. We still adhere to that opinion insofar as it is applicable to the present case upon the questions raised, but it will be observed that in the Doremus case the constitutional question was before the Court upon a different phase of the case from that presented here and, therefore, is not decisive of this case.

The Doremus case involved the question of the constitutionality of the Act as a revenue measure, and it was upheld.

The United States Constitution, 5th Amendment, provides, among other things: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law * * *."

The 6th Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * and to be informed of the nature and cause of the accusation * * *."

We respectfully contend that both of these constitutional provisions were violated, in that the plaintiff in error may be again placed in jeopardy for the same offense, owing to the fact that he could

not plead a former conviction in bar of another prosecution for the same offense—the indictment not charging a public offense—and for the further reason that he was not informed, by the indictment, of the nature and cause of the accusation against him. This case should be reversed if for no other reason than that the constitutional rights of the plaintiff in error were violated.

Another question which we have not heretofore raised is that of the indictment in this case charging more than one offense. It will be observed that the indictment contains nine different counts, alleging the issuance of prescriptions for narcotic drugs to that many separate and distinct persons, all on different date—ranging from October 18th, 1921 (if that is the date intended to be charged in the George Warner (first) count, to the prescription issued on February 9, 1922, as alleged in one of the last counts, and the Harrison Act had been amended in the meantime, as previously pointed out in an earlier assignment.

To briefly summarize some of the more important points, without waiving any of the others, we submit that the trial Court erred in the following respects: First. In overruling the demurrer of the plaintiff in error to prescriptions illegally seized, and the motion to suppress such evidence. Second, In the admission in evidence of such prescriptions. Third, In the admission in evidence of other prescriptions dated two months after the indictment.

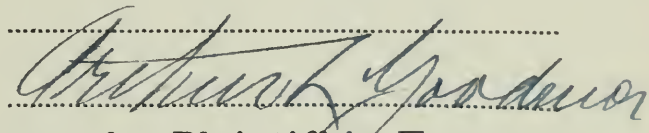
Fourth, In the rejection of evidence offered by plaintiff in error, to show the establishment of a clinic, under the approval of which the prescriptions were issued. Fifth, In refusing to give the instructions requested with reference to the issuance of prescriptions to bona fide patients. Sixth, In excluding evidence offered to show that the prescriptions in question had been approved by a United States narcotic officer. Seventh, In announcing in the presence of the jury that the rule laid down in the Webb and Jin Fuey Moy cases would be applied to this case, and in permitting the United States Attorney to proceed under that theory, when the cases were dissimilar. Eighth, In overruling motion of plaintiff in error for a new trial, for the reason that the conviction was procured by means of perjured evidence, and for the further reason that the indictment does not state facts sufficient to constitute a public offense. Ninth, In overruling motion in arrest of judgment, not only because the indictment does not state sufficient facts, generally, but for the further, and more specific, reason that the indictment does not describe the offense sought to be charged with sufficient clearness to enable the accused to know the nature and cause of the accusation against him, so that he could plead the judgment in bar of a future prosecution for the same offense, and by reason of which the plaintiff in error was illegally convicted, and his constitutional rights were violated.

In conclusion, we submit that the errors complained of are not technical, merely, but grave; that the commission of them affected the substantial rights of the plaintiff in error, and resulted in his illegal conviction.

We respectfully submit that the plaintiff in error did not have a fair and impartial trial, nor was substantial justice meted out to him, for which reasons the case should be reversed.

Respectfully submitted,

BENTON DICK,



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